No. 90-1791

In The
Supreme Court Of The United States
October Term, 1991

THE CONNECTICUT NATIONAL BANK,
Petitioner,

v.

THOMAS M. GERMAIN, TRUSTEE FOR
THE ESTATE OF O'SULLIVAN'S
FUEL OIL CO., INC.,
Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONER

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ARGUMENT

I. ENACTMENT OF SECTION 158(d) DID NOT CREATE A COMPREHENSIVE, EXCLUSIVE SCHEME OF APPELLATE JURISDICTION IN BANKRUPTCY CASES.

The Trustee's argument proceeds from the thesis that Congress, in enacting section 158(d), determined that section 1292 should no longer apply to bankruptcy cases.[1] (Brief of Respondent at 12). Employing two rules of statutory construction, the Trustee argues that section 158 was enacted to provide a comprehensive scheme for appeals from the bankruptcy court. (*Id.* at 7, 12).

Section 1292 was applied to bankruptcy cases filed before 1978. *See, e.g., Citron Investment Corp. v. Emrich*, 493 F.2d 561, 562 (9th Cir. 1974). Congress is presumed to know the law. *Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979). Congress is further presumed to know the judicial interpretation of that law. *Id.* at 697-98. Thus, either Congress in enacting section 158(d) meant to repeal this application of section 1292 or section 1292 continues to provide a method of limited, discretionary jurisdiction over bankruptcy matters in the court of appeals.

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[1] The Trustee appears reluctant to argue that section 1292 was impliedly repealed by the adoption of section 158(d). Indeed, he states at one point that it is "difficult to see how section 158 (d) in fact acts to repeal section 1292." (Brief of Respondent at 11). This approach differs from that of the court below which deduced an intent to repeal section 1292 from various aspects of the history of the legislation. *Germain v. Connecticut National Bank*, 926 F.2d 191, 197 (2d Cir. 1991), *cert. granted*, 60 U.S.L.W. 3292 (U.S. Oct. 15, 1991) (No. 90-1791) (J.A. 46-47).

The Trustee's argument that section 158 constitutes a comprehensive appellate procedure in bankruptcy matters, which procedure differs from that followed in non-bankruptcy matters (Brief of Respondent at 5), finds no support in either the text of section 158 or in its legislative history.[2] In addition, this purportedly comprehensive bankruptcy appellate scheme fails to address appeals from bankruptcy matters which are heard in the first instance in the district court. *See, e.g., Matter of Topco, Inc.*, 894 F.2d 727, 736 (5th Cir. 1990). Further, the Trustee's admission that the writ of mandamus is still available in bankruptcy cases[3] undercuts his argument that section 158 is a comprehensive appellate scheme.

The Trustee seeks to buttress his position that Congress intended a comprehensive and exclusive appellate scheme in section 158 through the application of two canons of statutory construction: (1) the presumption that "the legislature will not enact superfluous statutes," (Brief of Respondent at 7); and (2) the rule that specific statutes "take precedence over general statutes, absent a clear and manifest Congressional intent to the contrary." (*Id.* at 12).

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[2]The Trustee claims support for the exclusivity of section 158 in section 157. (Brief of Respondent at 7 n.2). However, the language cited merely reflects the fact that appeals permitted from the bankruptcy court are delineated in section 158. The language cited does not purport to address the review of district court orders entered in review of the bankruptcy court or court of appeals orders entered in review thereof.

[3]Brief of Respondent at 14.

Although both canons are available as aids in determining congressional intent, their use here is of questionable benefit.

As explained in a concurring opinion relied on by the Trustee, there is a rule of construction that "each word in a statute should, if possible, be given effect." *Crandon v. United States*, 494 U.S. 152, 171 (1990) (Scalia, J. concurring). *See also United States v. Menasche*, 348 U. S. 528, 538-39 (1955). To give effect to each word in section 158 and section 1292 is exactly what CNB asks this Court to do. There is no redundancy, or surplusage, between sections 158 and 1292. The only redundancy exists between part of section 158(d) and section 1291, which latter section is not involved in this case.

In addition, this rule in aid of construction is most helpful in construing a *single* statute, not in comparison of two separate statutes. For example, in *Crandon*, the Court was construing two paragraphs within section 209(a) of title 18 of the United States Code, 494 U.S. at 159, and in *Menasche*, the Court was construing subsections (a) and (b) of section 405 of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1101. 348 U.S. at 529-30. In the instant case, the Court must construe the effect of the enactment of one subsection of a statute enacted in 1984 (what has become section 158(d)) upon a section of another statute enacted more than twenty five years earlier (section 1292). As has been recognized, Congress can, and does, on occasion, enact provisions that are "superfluous." *Crandon, supra*, 494 U.S. at 174 (Scalia, J. concurring). Here, section 158(d) is, in part,

" 'merely affirmative or cumulative' " of section 1291.[4] *United States v. Borden Co.*, 308 U.S. 188, 198 (1939), *quoting Wood v. United States*, 41 U.S. (16 Pet.) 342, 362 (1842).

The second canon relied on by the Trustee, that specific statutes take precedence over general statutes, is likewise not helpful in this appeal. This rule is typically invoked in circumstances where a specific statute directly conflicts with a general statute. *See, e.g., Radzanower v. Touche, Ross & Co.*, 426 U.S. 148, 153-54 (1976) (application of a previously existing, narrow venue provision for banks versus application of a general venue statute applicable to all defendants under Exchange Act); *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974) (provision aimed at furthering Indian self-government by permitting employment preference given effect despite later general prohibition against racial discrimination in government employment). However, section 158 does not conflict with section 1292. Absent such a conflict, the Trustee must rely on a conflict with section 1291 to then infer an intent to repeal section 1292. *Germain*, 926 F.2d at 197 (J.A. 46). However, sections 158 and 1291, in common part, provide for the same jurisdictional grant: they do not conflict. Accordingly, this second canon is not an aid to construction here.

More appropriate to the analysis required in this case is a related rule of construction that, when two statutes

[4] In addition to affirming the jurisdictional grant in section 1291, section 158(d) provides an avenue of appeal from the newly created bankruptcy appellate panels to the court of appeals, which avenue is not otherwise provided for in the Code.

are capable of coexistence, they will both be given effect. *Morton*, 417 U.S. at 551. It is only when the provisions cannot co-exist that the canons relied on by the Trustee are helpful. *Id.* at 550. "Repeal is to be regarded as implied only if necessary to make the [later enacted law] work, and even then only to the minimum extent necessary. This is the guiding principle to reconciliation of the two statutory schemes." *Radzanower*, 426 U.S. at 155.

Here, the two statutes, section 158 and section 1292, can co-exist and, as such, "it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton*, 417 U.S. at 551. There exists no expression of intent, let alone a "clear and manifest" one, that in enacting section 158 Congress meant to repeal the application of section 1292 to interlocutory appeals from the district court to the court of appeals and then, only in cases which originate in the bankruptcy court. *In Re Moens*, 800 F.2d 173, 177 (7th Cir. 1986).

II. THE TRUSTEE'S POLICY ARGUMENTS ARE NOT APROPOS.

The premise of the Trustee's position must be that Congress adopted section 158(d) with the intent to narrow, *i.e.*, partially repeal, the availability of discretionary, interlocutory appeals. To accept the Trustee's argument, this Court must find that Congress intended to take away from the court of appeals, and in turn, this Court, discretionary review of certain bankruptcy appeals. To impute such a design to Congress would be no small matter, for it would seem to require that Congress had suffered a loss of confidence in the

exercise of the discretion vested in the federal judicial system but only with respect to interlocutory bankruptcy appeals originating in the bankruptcy courts.

The Trustee urges a policy argument upon the Court in support of this premise: he suggests that repeal of section 1292 advances expeditious resolution of bankruptcy cases. (Brief of Respondent at 7-8).[5] However, policy arguments are not appropriate in this context. The question before the Court is not whether Congress could have obtained the result the Trustee urges nor is it whether Congress should have caused that result. *See Tennessee Valley Authority v. Hill*, 437 U.S. 153, 194 (1978) ("Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by Congress is to be put aside in the process of interpreting a statute."). Policy considerations are for Congress, not the Court. The Court's duty is to determine what Congress intended when it enacted section 158 of title 28 of the United States Code. *Id.*

In addition to being inappropriate, the Trustee's policy argument proceeds from a rather narrow perspective. He assumes that the time and money of bankruptcy court litigants is saved by repeal of the applicability of section 1292 in some bankruptcy cases. (Brief of Respondent at 7-8). This perspective ignores the important, long-recognized benefit of vesting the appellate courts with the discretionary power to review, prior to final judgment, important questions of law, consideration of which not only may advance the case

[5] The Trustee's policy argument is not expressed in the legislative history of section 158. (Brief of Petitioner at 23-26).

at issue, but also establishes the rule of law for other litigants.[6] *See Ford Motor Credit Co. v. S.E. Barnhart & Sons, Inc.*, 664 F.2d 377, 380 (3d Cir. 1981). *See generally Church of Scientology v. Internal Revenue Serv.*, 792 F.2d 153, 155 n.1 (D.C. Cir. 1986), *cert. granted*, 479 U.S. 1063, *aff'd*, 484 U.S. 9 (1987) ("appellate review serves a dual purpose: the correction of legal error and the establishment of legal rules for future guidance"). The answer to the question presented to this Court by CNB in this appeal, however, will not be found in the area of policy rationales, but rather is apparent from the language of the pertinent statutory provisions.

CONCLUSION

The Trustee urges this Court to conclude that Congress intended to alter an appellate scheme, for those bankruptcy cases referred to bankruptcy courts only, and to take from the district court and court of appeals the shared discretion to allow limited interlocutory appeals to the court of appeals. In the absence of statutory language or clear intent expressed in the legislative history, the Trustee argues that such a result is justified for policy reasons and is required in order to give meaning

[6] At least one commentator, in concluding that § 1292 applied to bankruptcy cases, observed that the availability of such appeals "might often accomplish some benefits." 16C Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure* § 3926 n.13 (1977 Ed.). (Brief of Petitioner at 10-11 n.9).

to the seemingly innocuous redundancy that exists between section 158(d) and section 1291. Such a change, however, is rarely brought about by silence, and it would be improper for this Court to assume congressional intent from such silence. *See Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989). Permitting court of appeals jurisdiction over interlocutory orders under section 1292 and over final orders under section 158(d), however, would give meaning to both provisions in the context of bankruptcy appeals.

Because there exists no basis to support the conclusion that Congress intended section 158(d) to preclude application of section 1292, the Court should reverse the Second Circuit Court of Appeals by adopting the interpretation urged by CNB and thereby avoid the results presented by the interpretation urged by the Trustee.

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